

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHARON BOBBITT, Individually and On Behalf of All Others Similarly Situated,)	Case No. 04-12263-PBS
)	
Plaintiff,)	
)	
vs.)	
)	
ANDREW J. FILIPOWSKI and MICHAEL P. CULLINANE,)	
)	
Defendants.)	
)	
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MIKE TURNER, On Behalf of Himself and All Others Similarly Situated,)	Case No. 04-12294-PBS
)	
Plaintiff,)	
)	
vs.)	
)	
ANDREW J. FILIPOWSKI, MICHAEL P. CULLINANE, PAUL L. HUMENANSKY, TOMMY BENNETT, JOHN COOPER, JAMES E. COWIE, MICHAEL H. FORSTER, ARTHUR W. HAHN, THOMAS J. MEREDITH, J. KEVIN NATER and JOHN RAU,)	
)	
Defendants.)	
)	

PLAINTIFF TURNER'S RESPONSE TO LEAD PLAINTIFFS JAMES TITO AND FRANK WADDELL'S MOTION FOR CONSOLIDATION OF RELATED ACTIONS**I. INTRODUCTION**

This action was originally filed on September 30, 2003 in the Circuit Court of Cook County, Illinois on behalf of Mike Turner as plaintiff in a securities class action against certain officers and directors of divine, inc. ("divine") for violations of §§11, 12(a)(2) and 15 of the Securities Act of 1933 (the "1933 Act") in connection with divine's October 2001 acquisition of eshare Communications ("eshare") and divine's July 2002 acquisition of Delano Corporation ("Delano") (hereinafter collectively referred to as the "Acquisitions"). Plaintiff's complaint alleges only strict

liability and negligence claims concerning false and misleading statements of material fact and omissions of material facts in the Joint Registration Statements/Proxy Statements (collectively, the "Registration Statements") issued to the shareholders of Delano and eshare. Plaintiff seeks damages on behalf of himself and all similarly situated class members who were injured due to the purchase of divine securities issued pursuant to and traceable to the materially false and misleading Registration Statements utilized in connection with the Acquisitions. divine is not a party to this action.

On December 11, 2003 (over ten weeks after plaintiff Turner filed his action), lead plaintiffs James Tito and Frank Waddell ("Moving Plaintiffs") filed their Consolidated Class Action Complaint, for the first time adding claims on behalf of those individuals who acquired divine shares through the Delano acquisition.¹ On March 1, 2005, plaintiff Turner filed his Motion for Reconsideration of Remand (the "Remand Motion"), seeking to have his action remanded to Illinois state court. On March 8, 2005, Moving Plaintiffs filed this Motion for Consolidation of Related Actions ("Motion for Consolidation") seeking to consolidate the *Turner* action into the *Bobbitt* action for all purposes.

Plaintiff Turner believes this motion will be mooted as remand of his action is appropriate. If his action is not remanded, plaintiff Turner agrees that consolidation is proper. However, plaintiff Turner wishes to ensure that he and his counsel have an active leadership role in the litigation. Therefore, plaintiff Turner respectfully requests this Court deny the Motion for Consolidation, in part, allowing plaintiff Turner and his counsel an active leadership role in this litigation.

¹ On July 25, 2003, plaintiff James Tito filed his class action complaint, which asserted §11, 12(a)(2) and 15 claims on behalf of those persons who exchanged shares of eshare common stock for divine common stock. *See Ex. A.* However, that complaint does not allege that James Tito acquired divine shares in connection with the eshare acquisition. *Id.* at ¶5. Accordingly, it was unclear if James Tito is a proper representative for the claims concerning eshare. On December 11, 2003, in the Consolidated Class Action Complaint, it was asserted for the first time that James Tito acquired his divine shares through divine's acquisition of eshare.

II. ARGUMENT

A. Consolidation Is Improper as the Turner Action Should Be Remanded

As set forth in plaintiff Turner's Remand Motion, this Court does not have jurisdiction over his action. Thus, the *Turner* action should be remanded. As remand is proper, consolidation need not be considered.

B. If Remand Is Denied, This Court Should Consolidate the Actions

If plaintiff Turner's Remand Motion is denied, plaintiff Turner does not oppose consolidation of the *Turner* action with the *Bobbitt* action.² Turner just disagrees on who should occupy the leadership role. Therefore, this Court should appoint a leadership structure for plaintiffs. *See In re Cardinal Health, Inc. ERISA Litig.*, 225 F.R.D. 552, 554 (S.D. Ohio 2005) ("Selection of lead counsel is a duty often left to the court if the parties cannot decide amongst themselves.").

C. If Consolidation is Granted, The Court Should Select Turner's Proposed Leadership Structure

At the end of the Motion for Consolidation, Moving Plaintiffs state that "Tito and Waddell should continue to serve as lead plaintiffs for the Class and their counsel should continue to serve as Lead Counsel." Motion at 3. Plaintiff Turner, however, proposes that Turner serve as a co-lead plaintiff and Marc M. Umeda of Robbins Umeda & Fink, LLP serve as plaintiffs' co-lead counsel for the §§11 and 15 claims concerning eshare and Delano.³ This leadership structure will serve to efficiently coordinate all plaintiffs' common interests in prosecuting the case, while streamlining the proceedings and avoiding duplicative and unproductive effort. This structure also ensures that all plaintiffs have a significant voice in the litigation.

Turner and his counsel have worked to research the facts underlying their actions and in developing the allegations in his Complaint. Turner has also diligently fought the removal and transfer of his action. To deprive Turner and his counsel of any say in this consolidated litigation

² Plaintiff Turner does not oppose consolidation despite the fact that Turner names nine additional defendants and asserts one cause of action not contained in the Second Consolidated Class Action Complaint recently filed in the *Bobbitt* action. In fact, these differences merely emphasize the importance of allowing Turner the opportunity to lead this litigation if consolidation is granted.

³ Clearly, plaintiff Turner and his counsel should serve as sole lead plaintiff and lead counsel for Turner's §12(a)(2) claims, claims not asserted in the *Bobbitt* action.

would be unjust. Although not definitive, the fact that Turner filed his lawsuit over ten weeks before the other plaintiffs should also be given weight in determining who should lead this litigation. *See Lloyd v. Indus. Bio-Test Labs., Inc.*, 454 F. Supp. 807, 813 (S.D.N.Y. 1978) (appointing lead counsel based partly upon which counsel drafted the complaint). Accordingly, the Court should appoint Turner as a co-lead plaintiff and Robbins Umeda & Fink, LLP as co-lead counsel for plaintiffs for the §§11 and 15 claims concerning eshare and Delano.

III. CONCLUSION

This Court should remand plaintiff Turner's action. If not remanded, however, in the interests of equity, judicial economy and for the reasons set forth above, plaintiff Turner respectfully requests that the Court deny the Motion for Consolidation of Related Actions in part and appoint plaintiff Turner as co-lead plaintiff and Marc M. Umeda of Robbins Umeda & Fink, LLP as co-lead counsel for the §§11 and 15 claims concerning eshare and Delano. Plaintiff Turner also respectfully requests that he be appointed sole lead plaintiff and Marc M. Umeda of Robbins Umeda & Fink, LLP be appointed as sole lead counsel for the §12(a)(2) claim concerning eshare and Delano.

DATED: March 22, 2005

Respectfully Submitted,

s/ Marc M. Umeda

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF TURNER'S RESPONSE TO LEAD PLAINTIFFS JAMES TITO AND FRANK WADDELL'S MOTION FOR CONSOLIDATION OF RELATED ACTIONS** has been served on the parties on the attached Service List, via U.S. First- Class Mail, postage prepaid, on this 22nd day of March, 2005.

s/ Marc M. Umeda

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